**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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|---|---|---|
| **JACK L. GILLESPIE** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 202,825 |
| **QUAKER OATS COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **CRAWFORD & COMPANY** | ) | |
| Insurance Carrier | ) | |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

## ORDER

Respondent appeals from a Preliminary Hearing Order dated October 12, 1995, wherein Administrative Law Judge Floyd V. Palmer denied claimant benefits for his alleged hearing loss, but granted claimant medical benefits for his bilateral carpal tunnel syndrome, and ordered treatment with Dr. Lynn Ketchum. Respondent contends claimant's ongoing injury with Heinz, claimant's current employer, constitutes an intervening injury, thus relieving respondent of responsibility for the medical care and treatment of claimant's carpal tunnel syndrome.

## ISSUES

Whether claimant met with personal injury by accident arising out of and in the course of his employment with respondent.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purpose of preliminary hearing, the Appeals Board finds as follows:

The above enumerated issue is one listed in K.S.A. 44-534a as being appealable from preliminary hearing as the respondent contends claimant's injury stems from his employment with Heinz. This does generate an issue dealing with whether or not claimant suffered accidental injury arising out of and in the course of his employment with the respondent.

The evidence dealing with claimant's hearing loss fully supports the Administrative Law Judge's decision to deny claimant benefits. Claimant has suffered from hearing loss for many years with little or no additional loss over the last several years. The medical evidence indicates that claimant suffered a forty-five percent (45%) loss of hearing in 1984 with substantial increases between 1984 and 1988. Thereafter, it does not appear as though claimant's hearing worsened significantly. As such, the Appeals Board finds the Administrative Law Judge's denial of benefits to claimant for this hearing loss should be affirmed.

Claimant has also alleged entitlement to medical care as a result of carpal tunnel syndrome. Claimant alleges his ongoing symptomatology results from repetitive hand-intensive work activities with Quaker Oats through March 13, 1995. On that date, the respondent, Quaker Oats, was purchased by Heinz Company. Claimant continued performing the same job duties, with the same physical activity requirements subsequent to the sale of the company. Claimant testified to having discussed his ongoing symptomatology with the company nurse on several occasions, both before and after the purchase date. Claimant acknowledges his job duties have not modified since the company was purchased by Heinz.

Claimant has alleged injury with respondent through March 13, 1995, the date of sale. Respondent defends, asserting a date of injury subsequent to March 13, 1995, and further alleging that the claimant has encountered worsening symptomatology and additional micro-trauma, while employed with Heinz.

In deciding which date of injury would be appropriate, the Appeals Board notes three (3) significant Kansas Court of Appeals decisions. In Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d, 548, 1995, the Court of Appeals applied the “last injurious exposure” rule to claimant's back injury. In Helms the claimant suffered from a work-related wrist injury for which she was provided treatment. Subsequent to her date of injury, and while involved in ongoing physical therapy, claimant was involved in a car accident on her way home from a physical therapy session. The injury was held to be work related. The Court of Appeals, citing Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697, (1973), held that in natural consequence injury situations, the entitlement to benefits is limited to the results of one (1) accidental injury. The natural consequence rule would not apply when the increased disability resulted from a new and separate accident. Id. at 263. Relying upon Stockman the Court in Helms found that claimant's back injury was the responsibility of the new insurance carrier responsible for the period of time covering the automobile accident itself.

In considering claimant's actual date of injury, the Appeals Board must also consider the logic applied in both Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), and Condon v. Boeing Co., (Court of Appeals #73,251). In Berry the Court

of Appeals found, in establishing a bright-line rule, that injuries in carpal tunnel situations should be the last day worked by the claimant. It is obvious from the facts, of this case, that claimant would have significant difficulty meeting the burden in Berry as claimant has continued working, not for respondent but for respondent's ultimate purchaser, through the date of the hearing. If the last day worked rule is strictly applied, it would result in claimant receiving no benefits.

In Condon v. Boeing Co., the Court of Appeals, in considering the date of accident for bilateral carpal tunnel and also recognizing as the court did in Berry that carpal tunnel syndrome is a hybrid whose date of injury is difficult to pinpoint, found a date of injury when claimant first reported additional injury to Dr. Lesko, on June 15, 1993. The Court acknowledged applying the Berry rule would not be equitable in all circumstances. In this instance, claimant appears to fall neither under the umbrella of Berry nor under the umbrella of Condon. As claimant has not ceased working and has only recently requested medical care for his ongoing current carpal tunnel symptomatology, the Appeals Board finds claimant's date of injury to be ongoing. As such, the arbitrary date of March 13, 1995, picked by claimant only upon the basis that it was the date of sale of the company, would not be appropriate. In applying the "last injurious exposure rule" from Helms, *Supra*, the Appeals Board finds that an award of compensation to the claimant against the respondent, Quaker Oats Company, and its insurance carrier, Crawford and Company, would be inappropriate and said findings should be reversed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer, dated October 12, 1995, should be, and is hereby, reversed in part, and affirmed in part, and claimant is denied benefits as a result of the hearing loss alleged by claimant against respondent, and claimant is further denied benefits in the form of medical treatment for his bilateral carpal tunnel syndrome against the respondent, Quaker Oats Company and its insurance carrier, Crawford and Company.

The costs associated with the administration of the Kansas Workers Compensation Act are hereby assessed against respondent and its insurance carrier.

**IT IS SO ORDERED.**

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, Kansas
Timothy G. Lutz, Overland Park, Kansas

Robert L. Kennedy, Kansas City, Kansas
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director